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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-17

JOHN B. TUMMINELLO, *Petitioner,*

v.

STATE OF MARYLAND, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Petitioner, John B. Tumminello, prays that a writ of certiorari issue to review the decision and judgment of the Court of Special Appeals of Maryland in the above-entitled case entered on January 5, 1971.

OPINION BELOW

The opinion and judgment of the Court of Special Appeals are reported at 10 Md. App. 612, 272 A.2d 77, and are printed as Appendix A hereto. The denial of

the Petition for a Writ of Certiorari by the Court of Appeals of Maryland has not been reported but is printed as Appendix B hereto.

JURISDICTION

Petitioner was convicted of false pretenses in Baltimore, Maryland, on December 9, 1969. The Court of Special Appeals of Maryland issued an opinion on January 5, 1971, affirming the judgment. On March 5, 1971, petitioner filed a timely Petition for a Writ of Certiorari in the Court of Appeals of Maryland. That court denied the Petition on April 5, 1971. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Petitioner raised the constitutional points presented here at various points prior to, during and after his first and second trials [1] and on appeal.[2]

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[1] IA 152-156; IC 48-49, 52-53, 68; II 3-31, 33-34, 93, 109-131 (especially 124), 155-156, 239-243, 393-394, 414-415, 440, 449; III 12-15. Unfortunately, one volume of the transcript of record of petitioner's first trial was not numbered sequentially following the other volumes. Therefore, for the purposes of clarity, petitioner has used the following system of citing the record: "I" refers to the transcript of the first trial, "II" to the transcript of the second trial, and "III" refers to the argument on the Motion for A New Trial following the second trial. "A", "B", etc., refer to which volume of the transcript of the first trial is involved, and the final number used refers to the page cited in that volume. Thus, "IB 16" means page 16 of the second volume of the first trial. Since the transcript of the second trial *was* numbered sequentially, the letters ("A", "B", etc.) have been left out of the citations to the second trial.

[2] *E.g.*, Appellant's Brief in the Court of Special Appeals following the first trial, pp. 5-9; Appellant's Brief before the Court of Special Appeals following the second trial, pp. 13-17; Petition to the Maryland Court of Appeals, pp. 5, 28, 30, 32, 33, 37.

CONSTITUTIONAL AMENDMENTS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides, in part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *.

QUESTIONS PRESENTED

Was a criminal defendant's right to confrontation under the Sixth Amendment and his right to due process under the Fourteenth Amendment violated where the two principal pieces of evidence used against him—without which the State concededly could not convict—consisted of:

(1) the "canned" testimony from a prior trial of a man who was declared a paranoid schizophrenic with brain damage in each of the five years preceding his testimony; whose illnesses, according to the prosecution's own psychiatric testimony, were directly bound up with the events of this case and would distort his testimony, and who was so mentally ill at the defendant's second trial that he could not even be brought to the courtroom; *and*

(2) the transcript of a tape recording, the first and last parts of which were totally inaudible and the middle part of which was only partially audible, and in which the voice uttering the incriminating statements was never identified as the defendant's?

STATEMENT OF THE CASE

On April 4, 1968, petitioner was convicted of false pretenses[3] after a jury trial in the Criminal Court of Baltimore, Maryland. This conviction was reversed by the Court of Special Appeals of Maryland on August 5, 1969, on the ground that petitioner had been wrongly prevented from testifying about conversations with certain key figures in the case. *Tumminello* v. *State*, 7 Md. App. 380, 256 A.2d 342.

Thereafter, on December 9, 1969, petitioner was convicted of the same offense at a second jury trial in the same Criminal Court and given a sentence of three years in prison.

The events which led to these convictions began in August 1966, when one Robert A. Sewell was arrested for assault with intent to murder. He was subsequently convicted and began to serve his sentence. Sewell's attorney sent petitioner to Father Harry Maloney, a Catholic priest who had befriended Sewell. Petitioner had been a bail bondsman in Baltimore for five years (IC 148), had previously been a clerk for the Municipal Court for three years (*ibid.*), and had no prior crimi-

[3] According to the trial court's charge to the jury, the State had to prove three elements to convict petitioner of this crime: that there was a misrepresentation of a past or existing fact, that the misrepresentation was made with intent to defraud, and that the misrepresentation resulted in a transfer of money from a person to petitioner, causing the person to suffer a loss.

nal conviction. IC 384, 388. According to the prosecution, petitioner obtained money from Father Maloney to have the Sewell case "fixed"; a judge subsequently did release Sewell but placed him on parole on condition that he receive treatment at a mental hospital, and after Sewell's release petitioner obtained additional money from him on the false representation that petitioner had in fact fixed the case. According to the defense, petitioner acted at all times as a professional bail bondsman; during the course of these activities he discovered that Sewell's sentence would be suspended if he could obtain an appropriate letter from Father Maloney; petitioner did obtain such a letter, and Sewell thereafter voluntarily allowed petitioner to keep money which Sewell had advanced for a proposed bail bond and also paid him other monies.[4]

Three weeks after Sewell's release from prison, he was taken to the Office of the State's Attorney. IA 49-51. As a result of conversations held there on three different occasions, the State's Attorney obtained two *contemporaneous* orders from a judge of the Criminal Court, both based entirely on an affidavit by Sewell—a search warrant authorizing the recording of a conversation between Sewell and petitioner, and a warrant authorizing petitioner's arrest.[5] Nothing was said to the judge about Sewell's mental state, although papers which were in the State's Attorney's files at that time showed that Sewell had suffered from seri-

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[4] Petitioner's version was supported by the fact that at one point he gave Father Maloney a written receipt for some of the money in question. IA 242-243, 248-249; II 204-206.

[5] IA 11-17, 53-54, 67-68; II 485-488, 490. The warrant had no provision for a return, and none was subsequently made to the court. IA 33-34, 39, 40-41.

ous mental illnesses for many years, as detailed more fully below.[6]

On May 24, 1967, Sewell was outfitted in the State's Attorney's office with a recording device obtained from private sources and went to petitioner's office, where a number of people were gathered.[7] As the State's Attorney himself testified, Sewell was sent to petitioner with this device because "we fully expected" petitioner to incriminate himself; the purpose was to obtain a "transcript" of that incrimination.[8] Petitioner was not warned of the device or given any warning about incriminating statements. IA 32-33. Sewell was instructed to and did pay money to petitioner during the recorded conversation. IA 47, 94-95; II 402-404. Estimates as to how long Sewell was with petitioner, recording his voice, ranged from 15 minutes to an hour.[9]

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[6] II 112-114, 488-491, 494-495, 517, and see defense proffer at II 528-530.

[7] IA 78-79, 81, 103-106; IC 16; II 427, 430, 466-468, 479-482. It was a wireless type transmitter which could send signals to a receiving unit and under frequency modulation to a transmitter, which in turn was tied in by wire to a tape recorder. IA 104; IC 44; II 398. The transmitter was taped to Sewell's chest and a battery placed in his pants pocket. IA 105, 107.

[8] IA 32. The intent to incriminate petitioner is also shown at IA 46-47, where the State's Attorney was asked, "He [Sewell] was instructed to confer with Tumminello regarding what he is charged with?", and he replied, "Right. * * *" The State's Attorney told how he had concluded that "if we could arrange somehow to overhear one of the conversations that Mr. Sewell indicated to us were periodically taking place between himself and Mr. Tumminello, that would be enough by way of very strong corroboration to prove the case we were hoping to prove." IA 57. And he stated that his intent was "to make the arrest immediately after we got the electronic eavesdrop." IA 57. The prosecutor characterized the incident as a "raid". IC 248.

[9] IA 27, 40, 126, 132; IC 19, 34; II 406, 423, 475, 481, 492.

A police car was parked a few buildings away, with a taping unit plugged into the car's cigarette lighter.[10] Although at least five people were in the car at one time or another and overheard at least parts of the conversation as it was being taped,[11] *none* subsequently testified at either trial as to the contents of the conversation or the identity of the voices being overheard. The first and last parts of the tape were totally inaudible, and much of the middle part was inaudible or distorted, apparently due to the fact that an answering service had a transmitting station on top of a building very close to petitioner's building, and its frequency was the same or very close to the same frequency as the police recording unit. IA 106-107; II 399-401, 406, 475.

When Sewell left the building, officers entered and arrested petitioner, taking the money from him which Sewell had given him. IA 73-78; II 467-475. The tape was turned over that same afternoon to John H. Lewin, Jr., an Assistant State's Attorney for Baltimore City, and it remained in his private apartment for over seven months, during which time it was played at least twice by him. IA 114, 127-128, 132-133; II 405. It was then given to Mr. Yale Aarons, a Criminal Court stenographer. Mr. Aarons kept the tape for five days for the purpose of attempting to transcribe the voices, before it was returned to Mr. Lewin. Aarons had to play each section of the tape from two to twelve times in order to catch the words he transcribed. IC 62; II 421-422. However, because of the interference in the recording process, he was not able to transcribe

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[10] IA 82, 108, 113, 123-125; II 467-468, 480-481.

[11] IA 28, 108, 125-126; IC 34, 45-46; II 398-399, 467.

the first half of the tape, the ending, or many words, phrases, sentences and sections of the middle portion of the tape.[12]

Mr. Aarons did not know Mr. Sewell or petitioner and had never heard their voices. II 425. Nor was he familiar with any other voice—there were at least three—on the tape.[13] But Mr. Aarons had already been told by Mr. Lewin that "there would be two particular voices on the tape." II 417. *Mr. Lewin then*

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[12] II 417-422, 475; State's Ex. 3. As Mr. Aarons testified at II 425:

> "Q Actually the first part of the tape was wholly unintelligible?
>
> "A. Yes.
>
> * * *
>
> "Q. And how much of the portions of the tape would you say was wholly unintelligible?
>
> "A The first part of it. I don't know how many minutes it ran where it was not intelligible and then there was the last part of that tape that was completely—I couldn't hear a thing.
>
> "Q * * * I don't know whether that which you have transcribed is the beginning, middle or the end. * * *
>
> "A It's the middle, the middle portion of it."

Mr. Aarons further admitted that "A lot of it was not clear * * *." IC 62. He three times described the first part of the tape as "completely undiscernible." IC 65-66. As for the rest, "A lot of it was garbled. * * * I couldn't decipher everything. A lot of noise was in the background." II 418. Many parts, he said, were "entirely unintelligible." II 419. Even the court commented that "There is a great deal of noise, extraneous noise on the tape, that makes it difficult to understand * * *." IC 49. And the prosecutor at the second trial admitted that even at the time of the first trial, the entire tape was "virtually unintelligible." II 105. He also stated that the purpose of the transcript at the first trial was to permit Mr. Lewin to "read to the jury what had theretofore been unintelligible to them." II 106.

[13] IA 74, 82-83; IB 405; IC 35, 253; II 426-427, 430, 467-468, 470.

identified the voices of Mr. Sewell and petitioner for Mr. Aarons, and Mr. Aarons in turn placed "S" or "T" in front of the conversation which he transcribed from the tape, based solely on the directions of Mr. Lewin.[14] Mr. Lewin was the man directly and specifically assigned by the State's Attorney to take charge of the investigation and prosecution of the case against petitioner. IC 3; II 479, 509, 570. Although another Assistant State's Attorney was also assigned to the case, it was Mr. Lewin who:

—participated in the initial discussions with Sewell and took part in questioning him. IA 45, 49-51, 53; IC 126; II 511.

—brought Sewell in to have his affidavit taken, was present when it was taken, and brought him back to sign it. IB 514; IC 4, 12-13, 127.

—requested the technical equipment used to make the tape recording. II 397-398.

—had the arresting officer come to his office for instructions prior to the taping. IA 79.

—appeared with others before the court to obtain the search and arrest warrants and then kept possession of them overnight. IA 19-22, 55; IC 4-5; II 494, 512.

—was in charge of instructing Sewell as to how to conduct his taped conversation with petitioner. IC 23; II 477.

—supplied Sewell with Lewin's own personal funds to be marked and given to petitioner. II 466, 480.

—was in the police car listening to the tape while it was being recorded. IA 125, 133-134.

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[14] IC 63-64, 67; II 417, 426-428, 431; see also III 22-23, 26.

—was present at the search and arrest of petitioner. IA 134-135; IC 20; II 471, 482-483.

—took possession of the tape and, except for five days, kept possession of it in his apartment for ten months prior to trial. IA 44, 114, 127-128, 132-133; II 405.

—requested Mr. Aarons to transcribe the tape. IC 61; II 430-431.

—made out the indictments against petitioner. IC 128.

—testified against petitioner at the pre-trial hearing and at the first trial. IA 130-136; IC 144 *et seq.*

—represented the State at the hearing on the Motion to Suppress. IA 1.

—was the principal prosecutor against petitioner at the first trial, presenting both the opening statement and the argument to the jury at the close of evidence, reading the transcript of the tape to the jury, and examining or cross-examining all 14 witnesses with the single exception of when he himself testified. IA 218, 222; IC 78 *et seq.*, 144 *et seq.*, 352.

Because of the use made at the second trial of evidence adduced at the first trial, it is necessary to review briefly the two principal pieces of evidence introduced against petitioner at that first trial. They were (1) the transcript of the tape, and (2) the testimony of Mr. Sewell.

As to the tape, the court denied a pre-trial motion to suppress it (IA 149-150) and at trial overruled defense objections to both the tape (IC 47-49, 52-53, 56-57, 68) and the transcript of the tape. I 47-49, 52-53, 56-57,

70, 77-78. The transcript was therefore read to the jury.[15]

As to Mr. Sewell, evidence only partially developed at the first trial but developed more fully at the second trial showed his history as follows:

—His difficulties began when he was severely injured in the head during the Korean War in 1950. Early Veterans Hospital records varied as to whether his principal problem was a chronic brain syndrome or a paranoid schizophrenic reaction, but he without question had organic brain damage and an abnormal EEG pattern. II 146, 590.

—In 1954 he was admitted to the Crownsville State Hospital (a mental institution) and diagnosed as a schizophrenic, regular paranoid type, but also with a chronic brain syndrome with convulsive disorder and psychotic reaction. II 57, 593-594.

—By 1959 he had been "in and out of Veterans Hospitals" a number of times. In that year he was admitted once again to Crownsville,[16] and the diagnosis of both injury and psychosis continued. One doctor noted: "The degree of deterioration of all intellectual functions resembles one of the pre-senile syndromes

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[15] IC 78-87. The defense, without in any way waiving its objections to both the tape and the transcript, took the position that for the jury to listen to both the transcript being read and to the tape itself would unduly magnify the tape's importance. Therefore, since the tape was admittedly worthless without the transcript, and the court was ruling the transcript admissible, the defense allowed the transcript to be read without the playing of the tape—again without waiving objections. IC 58-59, 72.

[16] Police records show that this followed a charge of assault, striking, and malicious destruction of property.

(Picks disease) of Algheime disease * * *." II 145-146, 594.

—In 1960 he was admitted to Perkins State Hospital (another mental institution). He now had epilepsy with seizures, and his 100% service-connected disability evaluated him as "chronic brain syndrome with psychotic reactions". II 57, 145.

In early 1961 he was diagnosed at Perkins on several occasions after transfer from the Maryland House of Correction, with doctors noting his "very bizarre behavior and confusion," and finding him "disoriented, irrelevant in his replies to questions, restless and agitated and [with] some persecutory trends * * *." Sewell then took a turn for the worse and assaulted another inmate with a chair. By mid-year he had epilepsy *grand mal* and was showing "delusions of persecution," after having repeatedly been diagnosed as psychotic. II 55-56, 60, 140-141, 144-145, 589-594.[17]

On January 18, 1965, he was admitted to Fort Howard Hospital (still another mental institution). He was allowed to leave nine days later "against medical advice." IC 335.

By 1966 Sewell had received further head injuries through car accidents; he was noted by doctors to be "unreliable and irresponsible"; he was suffering from "chronic brain impairment which means that he has impaired memory, impaired judgment, impaired com-

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[17] Police records show that he was again committed to Crownsville in November 1964 following charges of disorderly conduct and carrying a deadly weapon. Further offenses were charged against him in 1965, 1966, 1968 and 1969. On May 5, 1970 (subsequent tc petitioner's second conviction), Sewell was charged with impersonating a police officer, was found not guilty by reason of insanity, and was committed once again to Crownsville.

prehension"; he had "impairment for recent memory and remote memory"; he was suffering not only from a memory defect but also from a severe distortion due to paranoid tendencies; he was in the "borderline mental defective range"; he was considered "a dangerous person," and there was "nothing more psychiatrically that can be done for this patient." IC 300, 307-313, 317-320; II 61, 63, 65, 141-142, 583-586, 591-592. In summary, "if he says something which happens to be untrue it is not because he is telling a lie but rather because his mind is functioning in such a way as to distort that." IC 312.

When Sewell was sentenced in 1967 for assault with intent to murder, the court stated that "he is deteriorating and you can tell he is a little dangerous." IB 532. And when the sentence was later suspended, Sewell's own attorney urged that he be sent to Fort Howard Hospital "by reason of his mental condition," which the judge ordered. IB 527.

Sewell was again found to be psychotic in 1968 (the date of petitioner's first trial), and by 1969 (the date of the second trial) he was so psychotic that he could not even testify. II 2, 14, 37-38, 47-50, 52-53, 61-63, 65, 71, 87, 142-144, 598. The psychiatrists were unanimous in their view that he was "a paranoid schizophrenic with superimposed organic brain syndrome, with brain trauma." II 37. Any account he would give would be "unreliable" (II 50) and "elaborated" (II 69); he was "hallucinating" and "receiving delusions" (II 87), and, most importantly, it was very likely in their judgment that his testimony at the first trial was subject to the same deficiencies as at the time of the second trial. II 71. Both his brain damages and his paranoia were permanent and incurable. IC 312-313; 318.

Sewell's testimony against petitioner at the first trial was so filled with error and contradiction[18] that it is difficult to summarize. By way of example only, we have printed as Appendix C a small portion of his comments relating to the amounts of money which were allegedly paid to petitioner.[19] Even the prosecutor admitted that he was "suffering rather severely from mental disorders" (II 175) and that he did "imagine things and gets things mixed up and confused and there's no doubt about that." II 647. Nevertheless, over objection (IB 327-328, 340-341, 346-348, 354), Sewell was allowed to testify.[20]

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[18] *E.g., cf.* IB 420-421 *with* II 146, 594; IB 495-496, 507-508 *with* IB 525, 533, and II 498; and IB 371 *with* IB 408. Sewell denied that he had ever been diagnosed "mentally sick" (IB 426), that he had ever been committed to a mental institution (IB 420-421), or that he had even been to Crownsville since his military service. IB 421-422. And see the prosecutor's concession at IC 145.

[19] One result of all this confusion was that the prosecutor at the second trial, over objection, amended the original indictment, which charged that the "thing of value" Sewell gave to petitioner was $2300, to a charge that the amount was only $700. II 25-29, 95-104, 640-645.

[20] IB 370-521. Defense counsel was severely limited in his cross-examination of Sewell (*e.g.*, IB 409, 409-410, 410-416, 416, 417-418, 419-420, 433, 437-438, 454-455, 464-466, 472-474, 496-497, 506-507, 508, 509, 511-512)—so much so that defense counsel moved for a mistrial as a result of repeated limitations on his questioning. IB 512.

A pre-trial psychiatric report on Sewell made for the Supreme Bench dated September 21, 1966, was ruled inadmissable (IB 367), despite long arguments by the defense as to its admissibility (IB 336-366); despite the fact that Sewell knew when the report was made that it would be used in court (IC 284-285, 296-297, 304-305, 313), and despite the fact that Sewell had waived any privilege in regard to it by using it himself in another proceeding. IB 511-512.

In addition the examination of the psychiatrist who testified about Sewell's mental condition was severely limited. The court

After petitioner's conviction and the reversal by the Maryland Court of Special Appeals, petitioner was brought to trial a second time. Over three and a half years had passed since the alleged crime. By now, Mr. Sewell had become "unavailable" in the sense that he was considered too insane to be able to testify.[21] Over objection,[22] his testimony from the first trial was read to the jury. II 288-390.

The tape was by now, if anything, in worse condition than it had been in at the first trial. The prosecutor himself admitted that this "very incriminating document" (II 106) was "very unclear," that there was "great interference, static, distortion." II 105. It was "virtually unintelligible," II 107; see also II 134. When the defense also objected to the identification of the voices on the tape, the court ordered the voices designated as "1" and "2" instead of "S" and "T". II 432-442. As a result, *the petitioner was never identified to the jury at the second trial as a speaker on the tape.* See III 12-14. This was particularly vital in view of the fact that petitioner had denied making a number of statements attributed to him in the transcript (*e.g.*, IC 252, 253, 263), and he had claimed that in some instances some one else had been speaking to Sewell (IC 253), or that he himself had been speaking

admonished defense counsel that "Not every mental defect can be shown * * *" and that the psychiatric testimony had to relate to Sewell's ability to observe and remember, to relate later what he had observed, or his ability to tell the truth. IC 299; see also IC 285, 298-299, 300, 301-303.

[21] II 2-3, 14, 34, 36-53, 150-151. The prosecutor admitted that if Sewell testified, "I don't think I will get anything other than completely incoherent ravings." II 14.

[22] II 3-33, 93, 108, 131, 150, 276-277. A motion to strike it at the conclusion of the reading was also denied. II 393-394.

to another client (IC 255), or that some one else had been speaking to some one other than Sewell. IC 260-261. Petitioner's attorney, who listened to the tape, found it "quite at variance" with the transcript. IC 53. Despite all this, the transcript of the tape was nevertheless read to the jury (II 451-462), over objection. II 155-156, 239-243, 440, 442, 462.

The only other testimony linking petitioner with the alleged crime was the testimony of Father Maloney. By his own admission, however, Father Maloney was a diabetic who suffered from a failing memory. IA 257-258. He repeatedly admitted he could not remember dates, statements or events.[23] At one point, he could not even remember testifying previously to the exact opposite of what he was currently testifying to. II 617-625. Yet he was asked to recall events which had taken place three and a half years ago in relation to a man who the Father himself said was only one of at least 500 whom he had helped over the years. IB 313-315.[24]

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[23] IA 232, 254, 255, 260-261, 262, 263, 264, 267, 268, 271-272; IB 279, 282, 284, 294, 297, 298, 300, 301, 302, 309, 311, 312, 315; II 201, 203, 207, 212, 213, 215, 223, 224, 226, 246, 248, 249, 254, 259, 262, 273, 274, 604, 617, 618, 619, 621, 623, 624, 625.

[24] Perhaps the best indication of the lack of force to his testimony are the following two points: (1) The prosecutor admitted that without the tape, there would have been no trial despite the presence of the Maloney testimony. II 648. (2) After the psychiatrist testified to Sewell's mental condition, the prosecutor admitted his reluctance to admit the "canned testimony" of a witness who was "under a substantial mental disorder at the time he gave that testimony." II 90-91. Therefore, he decided *not* to have Sewell's testimony read and said he would change his mind only "if the State's case otherwise did not hold up and I anticipate that it will." II 91-92; see also II 101. After Father Maloney gave his direct testimony, however (II 193-228), the prosecutor changed his mind about Sewell's prior testimony and asked that it be read to the jury. II 243.

Almost entirely on the basis of the transcript of the tape and the reading of Sewell's prior testimony, the jury returned a verdict of guilty, the Maryland Court of Special Appeals affirmed (App. A), and the Maryland Court of Appeals denied certiorari (App. B).

REASONS FOR GRANTING THE WRIT

This is a classic—and frightening—case of a man deprived of his Sixth Amendment right,[25] to confront the evidence against him and to have his jury see, hear and evaluate that evidence.

This was a second-hand trial in which the two principal pieces of evidence against petitioner—the two without which the prosecution concededly could not convict [26]—were never seen or heard by the jury.

The chief prosecution witness, Sewell, was an insane criminal who had not one psychotic disability but four: paranoia, schizophrenia, brain damage and epilepsy *grand mal*. He was, moreover, the most dangerous type of liar, for as the prosecution's own psychiatric witness put it, "I don't think he knows he is lying. * * * Of course, the schizophrenia paranoid type is characterized by delusions and doubt and disorder which has a tremendous bearing on any accounts they give." II 59, 67. This was a witness who lied to his own priest, whose sworn statements to the State's Attorney were in direct conflict with his testimony at petitioner's first trial, and whose testimony even standing by itself was riddled with conflicts, contradictions and utter confusion. It is almost impossible to believe that a man

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[25] This right, of course, is made applicable to the States through the Fourteenth Amendment. *Dutton* v. *Evans*, 400 U.S. 74, 79 (1970); *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965).

[26] IA 66; II 648; *cf.* II 91-92, 101, *with* II 243.

could be convicted of a crime on the basis of the type of testimony set forth in Appendix C. But even worse, the jury that convicted petitioner the second time never saw this witness, never was able to gauge for itself his demeanor and manner while giving this extraordinary testimony.[27] Surely it is more important for a jury to assess the personal performance of an insane man than that of the ordinary witness.[28]

This is not a case in which evidence of insanity subsequent to a crime or a trial is used in an attempt to prove insanity prior to the crime or trial. Sewell's insanity was fully documented as far back as 1950—18 years before he testified—and he was found to be psychotic in *every one* of the five years immediately preceding his testimony. Moreover, it was not a fleeting or casual type of neurosis but a permanent psychosis;[29] it was an illness that affected both his memory

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[27] If a confession is not admissible because there is substantial evidence that the defendant was incompetent and insane at the time he made it (*Blackburn* v. *Alabama*, 361 U.S. 199 (1960)), the primary testimony against a defendant by a third party should be judged in the same light. One is as equally damaging, and as equally likely to be false, as the other. All courts agree that a witness must be able to give a correct account of the matters he has seen or heard. *District of Columbia* v. *Armes*, 107 U.S. 519 (1883).

[28] That is why "sound discretion demands the exercise of great caution in qualifying as competent a witness who has a history of insane delusions relating to the very subject of inquiry in a case in which the question is not simply whether or not an act was done but, rather, the manner in which it was done and in which testimony as to details may mean the difference between conviction and acquittal." *People* v. *McCaughan*, 49 Cal.2d 409, 317 P.2d 974, 981-982 (1957) (per Traynor, J.).

[29] Insanity, once established, is assumed to continue unless it is cured or unless there is a long lapse between the illness and the event in question. Wharton, *Criminal Evidence*, § 119; Annot., 27 ALR 2d 121.

and his ability to tell the truth, and it was one which manifested itself in connection with the very events about which he testified.[30]

For present purposes however, the more important point is that at the first trial, although the jury did not have before it all the facts about Sewell's illness, it at least had the opportunity to see and evaluate the man. Petitioner was able to confront the witness against him. But at the second trial, no one—neither jury, court nor defendant—even saw the witness. This hopelessly insane person, whose testimony, in the prosecutor's words, would have amounted to no more than "completely incoherent ravings" (II 14), never appeared. Instead, his prior testimony was read to the jury.

We recognize, of course, the general rule that the prior testimony of a witness may be read to the jury if the witness is no longer "available" and if full cross-examination was allowed when the testimony was originally given. But, as demonstrated in footnote 20, *supra,* cross-examination was not fully available at petitioner's first trial—neither as to Sewell nor as to the psychiatrist who testified about his condition.[31] More-

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[30] In fact, one of the important reasons why Sewell was not permitted to testify in person at the second trial was that "his paranoid elaborations are related to the events he is supposed to testify on." II 76-77. After pointing out that some topics are more sensibly discussed by mental patients than others (II 67-68), the psychiatrist then demonstrated in detail how Sewell's account of the incidents involving petitioner was a topic intricately interwoven with his illness. II 69-70. This is the type of situation specifically warned against by Wigmore (§ 422, p. 585).

[31] See *United States ex rel. Smith* v. *Baldi,* 344 U.S. 561, 571 (1953). Surely restrictions on cross-examination in a case such as this one, where both the witness and the tape are suspect from the

over, in *Barber* v. *Page,* 390 U.S. 719 (1968), this Court stressed the importance of having the witness made available for trial rather than having his testimony from a prior hearing read to the jury. See also *Washington* v. *Texas,* 388 U.S. 14 (1967). This should be particularly true where the witness's present condition is related back to his condition at the time he testified, so that the jurors, by seeing him now, are receiving with some accuracy the same impressions they would have received if they had heard him originally.

Perhaps most importantly, additional psychiatric testimony and records developed at the second trial showed more fully than previously just how insane Sewell had been when he originally testified. The psychiatrist at the second trial, in fact, was able to relate Sewell's condition *back* to the time he testified. After showing at some length how Sewell was not "available" because his testimony would be so completely unreliable and distorted, the psychiatrist stated repeatedly that Sewell's mental difficulties went back many years (II 50, 53, 63, 65, 66) and that it was "very likely" that his prior testimony was subject to the same deficiencies as those facing him at the time of the second trial. II 71.

In the face of this evidence and the additional psychiatric reports adduced at the second trial, it was a denial of both due process and the right to confrontation for the court to have allowed this witness to testify

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outset, are as serious as those which this Court has condemned in other Sixth Amendment cases. *E.g., Pointer* v. *Texas, supra; Douglas* v. *Alabama,* 380 U.S. 415 (1965); *Brookhart* v. *Janis,* 384 U.S. 1 (1966). The jury here was as unprotected from being misled as was the one in *Bruton* v. *United States,* 391 U.S. 123 (1968), and *Roberts* v. *Russell,* 392 U.S. 293 (1968).

against petitioner not in person but on the basis of "canned testimony." As the trial court said at one point, "I am awfully concerned about using canned testimony in the case where the man might well have been suffering from delusions which would affect the accuracy of his testimony." II 83. Yet that is precisely what the court proceeded to allow.

Sewell's testimony, however, was not the only second-hand evidence used to convict petitioner. The "incriminating" tape of petitioner's conversation with Sewell was never heard by the jury at the second trial, and in its place was an alleged "transcript", read to the jury by the prosecution.

We begin with the fact that there never was a complete tape (n. 12, *supra*). The entire beginning and end of petitioner's conversation, which might well have explained or put an entirely different light on the middle portion, was completely eliminated by transmitting interference. Mr. Aarons did not even attempt to transcribe most of the tape.[32]

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[32] See *United States* v. *Kabot*, 295 F.2d 848 (2d Cir. 1961), *cert. denied*, 369 U.S. 803 (1962), where too small a portion of the tape was deemed available. In *United States* v. *Bryant*, — U.S. App. D.C. —, 439 F.2d 642 (1971), a tape was taken of conversations, between an undercover agent of the Bureau of Narcotics and Dangerous Drugs and the three defendants, who were subsequently accused of selling heroin. The agent made no effort to preserve the tape, and it was in fact lost prior to trial. In view of the due process requirement that certain materials be disclosed to the defense, the Court of Appeals ordered a hearing as to the agent's negligence on the theory that if he had been negligent in failing to preserve the tape, the indictment would have to be dismissed. The tape, said the court, may have corroborated the agent's story, "or, for all we know, it might have completely undercut the Government's case. * * * What we do know is that the conversations

As to the middle portion which he did attempt to transcribe, by his own admission what he heard was often inaudible, distorted, unclear or undiscernible (n. 12, *supra*).[33] The result was a patchwork transcription, with many words and phrases left to guesswork and the imagination of the jury. In *United States* v. *Schanerman*, 150 F.2d 941 (3d Cir. 1945), the court held that transcribed notes by a stenotype operator from recordings "repeatedly" played were properly excluded. Here, Aarons had to play *each portion* of the middle section of the tape from two to twelve times in order to discern anything at all to write down. He was attempting to hear, in other words, what the prosecutor admitted that the jury could not hear (n. 12, *supra*). Mr. Aarons was substituting his own perception and discernment for that of the twelve jurors. Even assuming that this would be permissible in the case of a transcript authenticated by independent sources who had personally overheard the recorded conversation, certainly it is entirely impermissible

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recorded on the tape were absolutely crucial to the question of appellants' guilt or innocence." 439 F.2d at 648 (citations omitted). We see very little difference from the defendant's standpoint between a tape negligently lost and the tape which was preserved in this case—virtually inaudible, subject to control by the prosecutor for ten months prior to the first trial, even then not heard and evaluated at the trial, but nevertheless used through a transcript to convict.

[33] In *People* v. *Stephens*, 117 Cal. App. 2d 653, 256 P.2d 1033 (1953), a recording was rejected because much of it was unintelligible and subject to varying interpretations by the jurors, and no witnesses who heard the recorded conversations testified as to their content or the accuracy of the recording. Similarly, in *Melvin* v. *State*, 210 Miss. 132, 48 So.2d 856, 49 So.2d 837 (1950), a wire recording was excluded from evidence because of its lack of clarity.

where there is *no* independent authentication.[34] In this respect, it is highly significant that at least five people—at least one of whom knew Sewell personally (IC 35)—overheard parts of the tape while it was being recorded, but *none* verified the contents of the tape or any part of those contents during either trial.

Nor was that all. This tape had remained for seven months prior to Mr. Aarons' transcription in the personal possession of the man charged with investigating and prosecuting the case. Mr. Lewin participated, in fact, from the very first discussions with Sewell to the closing argument to the jury in the first trial. He had even been present at petitioner's arrest.[35] It was he who selected and instructed Mr. Aarons to transcribe the tape, and *it was he who identified the voices of petitioner and Sewell on the tape.* Again, even assuming that the transcriber need not be personally familiar with the voices of the speaker—as Mr. Aarons was not—surely the party who identifies those voices, who ties the defendant in a criminal case directly to the

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[34] The courts are unanimous that tapes and transcripts, if otherwise admissible, must be properly authenticated. See 58 ALR 2d 1032-1036; McCormick on Evidence, § 196; 4 Wigmore on Evidence, § 1192. Moreover, where a recording cannot be used for some reason, the prosecution's use of a transcript has been held a denial of the defendant's right to be confronted by the best evidence. *United States* v. *Stephenson,* 121 F.Supp. 274 (D.D.C. 1954), *appeal dismissed,* 96 U.S. App. D.C. 44, 223 F.2d 336 (1955).

[35] As recently as June 21, 1971 this Court had occasion to point out that the chief government enforcement agent of the State is not "neutral and detached" and "cannot be asked to maintain the requisite neutrality with regard to their own investigations—the 'competitive enterprises' which must rightly engage their single-minded attention." *Coolidge* v. *New Hampshire,* 39 U.S.L. Week 4795, 4797.

"incriminating" evidence, cannot be the man assigned to see that the defendant is convicted.[36]

As if this were not fatal enough, the judge at the second trial eliminated the letters attributing the recorded remarks to petitioner and Sewell, and thereby did away with the only semblance of evidence purporting to tie petitioner to specific statements. No one attributed the patch-work comments in the transcript to petitioner's voice, although any number of officers who had overheard the recording and been present at petitioner's arrest might have done so. The jury at the second trial undoubtedly assumed that the speakers, though numbered "1" and "2", must have been previously and properly identified as Sewell and petitioner; otherwise there would be no point in the introduction of the transcript. Yet no previous and proper identification was made. The transcript therefore became a wholly improper, second-hand piece of evidence, used in place of a tape which the jury never heard.[37] This is not merely an evidentiary issue; this goes directly to the question of whether petitioner could even be tied to the crime, as well as to the question of whether he confronted the evidence that convicted him.

The denial of petitioner's right to confrontation, however, was not the only constitutional violation here. The

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[36] Compare *Fountain* v. *United States*, 384 F.2d 624, 632 (5th Cir. 1967), *cert. denied sub nom. Marshall* v. *United States*, 390 U.S. 1005 (1968), where the transcriber was "personally familiar with each of the parties to the recorded conversations and was able from experience to identify the voices."

[37] If a tape is inaudible, the jury should know this and judge it on that basis. It is not the prerogative of the prosecution to convert an indecipherable tape into a decipherable one through the aegis of a written transcript, for the very starkness of the written word misleads the jury as to the condition of the tape.

totality of circumstances in this case, including the following, clearly shocks the conscience and violates due process:

—The warrants obtained against petitioner had no provision for a return, and none was made (n. 5, *supra*), as this Court has twice said is a necessary ingredient to a valid warrant. *Berger* v. *New York,* 388 U.S. 41, 60 (1967); *Katz* v. *United States,* 389 U.S. 347, 356 (1967).

—The warrants were obtained without disclosure to the court of Sewell's record of serious mental illnesses, even though evidence of these illnesses was in the State's Attorney's files at the time. The Court of Special Appeals noted the testimony of the State's Attorney that "he was not personally aware of the information" about Sewell in his own files, but the court failed to note a lack of such testimony from the Assistant State's Attorney actually in charge of the case, Mr. Lewin. IC 3; II 509, 570. The State's Attorney agreed that this was information to which the court was entitled in order to pass on the application for the warrants. II 515-517.

—The warrant for the recording and the warrant for petitioner's arrest were sought and granted at the same time (n. 5, *supra*). Since even the State's Attorney conceded that he needed the tape recording in order to prove his case (IA 66), it is obvious that the arrest warrant was without probable cause at the time it was issued.

—The circumstances surrounding the recorded conversation between Sewell and petitioner inextricably spell entrapment. The State's Attorney admitted, in fact, that the whole point of the tape and the marked money was to incriminate petitioner (n. 8, *supra*). See

United States v. *Klosterman,* 248 F.2d 191 (3rd Cir. 1957); *Capuano* v. *United States,* 9 F.2d 41 (1st Cir. 1925).

When these facts are combined with those recited above in relation to Sewell and the tape, we respectfully submit that due process has been denied. These facts in combination strongly call for a reversal of petitioner's conviction by this Court.

CONCLUSION

There has been an increasing tendency of late for both state and federal courts to use prior or secondary evidence instead of "live" evidence. This Court has approved some of these uses.[38] But surely there comes a point in the use of second-hand evidence where the rights to confrontation and due process disappear. We submit that they did in this case, where the "canned" testimony of an insane man and the partial transcript of an inaudible recording combined to convict a man of false pretenses.

Respectfully submitted,

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[38] *E.g., California* v. *Green,* 399 U.S. 149 (1970); *Dutton* v. *Evans, supra.*

APPENDIX

APPENDIX A

JOHN TUMMINELLO

v.

STATE OF MARYLAND.

No. 81

Court of Special Appeals of Maryland.

Jan. 5, 1971.

Argued before ORTH, THOMPSON and POWERS, JJ.

THOMPSON, Judge.

John Tumminello, the appellant, was convicted of false pretenses by the Criminal Court of Baltimore. He was sentenced to a term of three years. On appeal his conviction was reversed by this Court, Tumminello v. State, 7 Md.App. 380, 256 A.2d 342. He was retried in the Criminal Court of Baltimore, Judge David Ross presiding with a jury and upon reconviction was sentenced to a life term. On this appeal he raises questions as to: (1) sufficiency of the evidence; (2) the mental capacity of Robert A. Sewell to be a witness against him; (3) an amendment to the indictment; and (4) the admission of a stenographer's transcript interpreting a tape recording.

There was evidence showing that Robert A. Sewell was arrested in August of 1966 on a charge of assault with intent to murder; on December 9, 1966, Sewell was convicted and sentenced to a term of four years in the House of Correction. He engaged an attorney to handle his appeal who apparently sent John Tumminello, a professional bondsman, the appellant, to one Father Maloney to secure money to pay for the appeal bond. Tumminello told Father Maloney that he had been sent to collect $600. for which

he would have the case against Sewell "fixed". On this assurance Father Maloney gave the appellant $600., $500. of which he had obtained from a joint account between himself and Sewell; the other $100. was his personal funds. Afterwards, while visiting Sewell in the House of Correction, Tumminello told Sewell that on the following Monday he would be brought into court and placed on probation but it would cost $1,000. to "spring" him.

Previously, through the efforts of Sewell's counsel and the Father, Judge James K. Cullen had agreed to conduct a hearing on the Monday in question to determine whether the sentence should be stricken and Sewell placed on probation. After the hearing was completed he was placed on probation, although the judge was not aware of any of Tumminello's activities. After Sewell was released, he went to the appellant's office where the appellant informed him that additional monies were needed. Sewell said that at this time he requested the appellant to advise him as to how much he had been paid and that he listed an amount in excess of $2,000.[1] and told him that he would hold the receipt on his desk until more money was paid. The appellant then took Sewell to Father Maloney's home and while the appellant waited, Father Maloney and Sewell went to the bank and withdrew $300. of which Sewell gave the appellant $290. Tumminello continued to demand money from Sewell who complained to the State's Attorney. On May 23, 1967, the State's Attorney, under Md.Code, Art. 27, § 125A obtained an order from Judge J. Gilbert Prendergast to use an electronic device to overhear and record a conversation between Sewell and Tumminello. The order was based upon an affidavit by Sewell. At the same time an arrest warrant and search and seizure warrant were also issued.

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[1] On cross-examination, Sewell explained the remainder of the monies paid had been obtained by Tumminello from a lock box which was in the custody of some of his relatives.

At the direction of the State's Attorney, Sewell then arranged to meet Tumminello in his office for the purpose of paying him additional money. Sewell was supplied with $150. marked money which he took to Tumminello's office, with a hidden microphone which was to transmit the conversation to a recording device set up in an automobile near the office. Sewell entered the office, paid $100. of the money to Tumminello and had a conversation, the recording of which was partially garbled. When Sewell left the premises, the police entered, arrested Tumminello and recovered the $100. The portion of the conversation which was recorded concerned Sewell's claim that his attorney was demanding more money, and was threatening to have the suspension of his sentence revoked if he was not paid; and Tumminello's lengthy advice that Sewell did not owe his lawyer any more money as he, Tumminello, was responsible for the change of sentence. A stenographer's transcript of the clear portion of the tape was admitted in evidence.

Tumminello did not testify at the second trial. Additional facts will be stated as various contentions are discussed.

I. Sufficiency of the Evidence

Sewell testified that he was convinced Tumminello had "fixed the case" because the suspension of sentence occurred at the exact time and exact manner Tumminello had previously predicted and that he, Sewell, paid him the funds because he thought it was necessary for the appellant to obtain funds with which to bribe the judge and State's Attorney, as appellant had represented to him. The trial judge and the State's Attorney both testified, denying receipt of any money or any knowledge of the appellant's activities.

In Lockard v. State, 3 Md.App. 580, 583, 240 A.2d 312, 313, we quoted the requirements set out in Smith v. State,

237 Md. 573, 207 A.2d 493, 495 to establish the crime of obtaining money by false pretenses as follows:

> "'(1) false representation of a past or existing fact; (2) made with intent to defraud; and (3) that the victim actually relied on the false representations to her loss.'"

Clearly, the evidence recited sufficiently supports a guilty verdict under the aforegoing definition of the law.

[1] Appellant contends the evidence was insufficient to support his conviction by reason of the rule set out in Kucharczyk v. State, 235 Md. 334, 201 A.2d 683 wherein the Court of Appeals held that when a witness stated on direct examination that a crime occurred and on cross-examination that no crime occurred, his testimony was too inconsistent to support a verdict of guilt. He points to Father Maloney's testimony at the prior trial that the money given to Tumminello was for bail as inconsistent with the testimony in the present trial that the money was for a "fix." An analysis of the testimony shows that the testimony is not as inconsistent as represented. Although some unimportant details of Father Maloney's testimony were inconsistently recited, his testimony as to the important matters was clear. The record shows that appellant stated on the telephone that he wanted $500. from Father Maloney for the bail but when he arrived at the house to collect the money, he demanded $600., stating it was to "fix" the case.

[2] This difference as to which conversation was referred to accounts for the apparent discrepancy. Appellant also contends that this testimony made Father Maloney an accomplice, whose testimony must be corroborated. Assuming, without deciding, that this is true, there was ample evidence to corroborate the testimony in Sewell's testimony and in the tapes.

[3] Appellant further contends that since the money furnished by the State's Attorney was not lost, the victim did not rely on a false representation to his loss. This argument entirely overlooks the other sums paid, especially the $290. paid by Sewell to Tumminello at Father Maloney's home after Sewell had been released on probation.

II. Incompetency of the Witness Sewell

At the second Tumminello trial, the witness Sewell was found mentally incompetent to testify. The trial court held Sewell's insanity made him sufficiently unavailable for the present trial so as to allow the testimony from the prior trial to be admitted. In his appeal, appellant makes two concessions and raises two contentions. He concedes that: (1) Sewell was in fact incompetent at the second trial, (2) under Contee v. State, 229 Md. 486, 184 A.2d 823, proof of the insanity of a witness is proof of sufficient unavailability to admit his testimony from a prior trial. See also Britton v. State, 10 Md.App. 70, 267 A.2d 747 as to proof of unavailability in general.

[4] Appellant's two contentions concerning Sewell's incompetency are: (1) Since Sewell's insanity is not permanent, and since possibility of recovery exists, the witness Sewell, although insane at the time of the second trial, would have been cured (and thus available) within a short time; therefore, it was error to admit his testimoney from the prior trial. (2) Sewell was also incompetent at the time of the first trial; therefore, his testimony from the first trial should not have been admitted at the second trial.

To support his first argument on Sewell's incompetency, appellant cites Lindsay v. State, 2 Md.App. 330, 234 A.2d 479 holding that a witness being out of state until one or two days after the trial occurred was not sufficient unavailability to admit the testimony of the witness from a prior trial. The principles applied in *Lindsay* have no

application to the facts of the present case since Sewell's recovery, if any, was vague, indefinite, and uncertain. The only specific testimony on Sewell's cure was as follows:

> "The Court: Do you have any expectations that further treatment will result of curing him to a point where he will be able to at some future date testify in his own defense in the charges pending against him?
>
> "The Witness [Dr. Adamo]: Well, we are trying. He is being treated the best we can but I must say that this paranoid type of schizophrenia is very difficult to treat. These beliefs which are based on a false reasoning are very difficult to change and modify. So, the only thing I can answer, we keep on trying in the hope that he will improve."

The vagueness of this testimony readily demonstrates the difference between the cure of this mentally ill witness as opposed to the return of a witness to this jurisdiction in a few days.

[5, 6] Appellant more strenuously urges the testimony showed the witness was incompetent to testify at the time of the preceding trial, March 1968; therefore, the transcript of his testimony at that trial should not have been admitted in the instant trial. The only witness offered to the trial court in the instant trial on the competency of Sewell at the first trial was Dr. Ido Adamo, a psychiatrist at Clifton T. Perkins State Hospital. The gist of Adamo's testimony can be summarized by the following quotes:

> "Q. [by defense counsel] Now, my question of necessity has to follow: Assuming the hypothetical question that my brother, Mr. Ozer recited concerning the facts in this present case today as applied to May, 1967, would you in your opinion be able to say whether or not in May of 1967, when he gave an affidavit to the State and the next month—

"Mr. Ozer [Assistant State's Attorney]: March of '68 was the trial.

"Q. (Continuing)—and the subsequent trial in February and March of 1968, assuming those two appearances by Mr. Sewell under oath, I ask you now again, whether or not in May of 1967, when he gave an affidavit to the State and in March and February of '68 when he was a witness in a trial, whether Mr. Sewell had sufficient understanding to apprehend the obligation of an oath? That is the first question. Did he have sufficient understanding to apprehend the obligation of an oath? That's the first question".

* * * * * * * * *

"A. I think I would answer the same way I answered that time. I would say yes.

"Q. The next question is, in May of 1967 and in February and March of 1968, on which occasions he made statements under oath, did he in your opinion, did Mr. Sewell have the capacity and was he capable of giving a correct account of the matters which he had seen or heard in reference to those things which were the subject of an affidavit in May of 1967 and were the subject of a trial in which he was a witness in March of '68?"

* * * * * * * * *

"The Court: Can you give an opinion in response to that question with a reasonable degree of medical certainty based on the examinations which you have made of the patient and reports in the file Doctor?

"The Witness: Well, I can only say that there is no question about the fact that he has been mentally ill for many years and that he was suffering from a mental disease and defect in 1966, '67 and '68 and '69, but I have some difficulty in determining with certainty the intensity of the disease and the facts during each time I have been asked. You know, these conditions

go up and down. Sometimes the patients are fairly reasonable, fairly in contact but there are some other times that they are just—the reality testing is just too much impaired. So, the occasions I have had do not allow me to answer with precision the question.

"By Mr. Sharretts:

"Q. Well, could I then—

"A. As I said, there's no question in my mind, I think in nobody else's mind that he has been mentally sick for many years.

"The Court: But am I interpreting what you're saying correctly in that even though he has been suffering from these diseases that you have described over a long period of time, without examining the patient, you cannot determine at any given point in time during that period whether or not he can give a reasonably accurate account of events?

"The Witness: No, I cannot be precise in that."[2]

Obviously, this testimony fails to overcome the presumption that the witness was sane at the time he testified. See 2 Wigmore, Evidence, §§ 484, 497 (3d Edition); 1 Warton, Criminal Evidence, § 119 (12th Edition); 3 Jones, On Evidence, § 760 (5th Edition). The following cases have applied the presumption: Terry v. O'Neal, 194 Md. 680, 72 A.2d 26; Johnston v. Frederick, 140 Md. 272, 117 A. 768; and Rasnick v. State, 7 Md.App. 564, 256 A.2d 543. The proof of insanity must be clear and conclusive. Johnston v. Frederick, *supra,* Terry v. O'Neal, *supra.*

We cannot say the trial judge in the instant case abused his discretion in receiving the testimony.

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[2] Other testimony showed that the witness was making use of medical records as well as his personal examinations in making his conclusions.

III. Amendment of the Indictment

[7] Immediately prior to trial, the Assistant State's Attorney indicated he might proceed without Sewell's testimony and requested the court to amend the indictment as to the amount of false pretenses from $2300. to $700. Over objection, the court granted the amendment. On appeal, appellant, while acknowledging the failure of the State to prove the exact amount stated in the indictment, would not be of any legal importance, alleges he was deprived of a valuable impeachment tool.

In Watkins v. State, 4 Md.App. 47, 50, 240 A.2d 787, this Court discussed Md. Rule 714a which authorizes the trial court to permit an amendment of indictment any time before a verdict as to a matter of form, but not as to a matter of substance, quoting the rule laid down in Corbin v. State, 237 Md. 486, 489, 206 A.2d 809, 811 as follows:

> "As to what constitutes substance and what is merely formal in an indictment, it may be said that all facts which must be proved to make the act complained of a crime are matters of substance, and that all else—including the order of arrangement and precise words, unless they alone will convey the proper meaning—is formal."

Since the amendment here was without legal significance, it is obviously within the discretion of the trial court to permit the amendment. The purpose of an indictment is to inform the accused of the charges, not to provide impeachment tools. Further, prior to argument to the jury, the trial judge offered to rescind the order granting permission for the amendment and to permit the case to be submitted to the jury on the basis of the $2300. figure but the offer was declined by the appellant's counsel. Although it seems that the alteration of the figure might have caused some minute interference with counsel's argument to the jury, we do not see how the figure in an indictment could

be used to impeach a witness with any great effectiveness. We cannot say the trial judge abused his discretion in permitting the amendment of the indictment.

IV. Admission of the Tape Recording

Appellant presents three reasons to support his contention that the evidence the State produced through the tape recording should not have been admitted.

[8, 9] First, he contends the record shows that at the time Sewell made the affidavit, he was incompetent to testify in these proceedings. The testimony of the psychiatrist quoted under II, *supra,* shows the incompetency at the time the affidavit was made (May, 1967) was not factually established; therefore, the argument falls, even assuming an incompetent witness could not under any conditions provide probable cause for a search warrant at a time when his testimony would not have been admitted at a trial. The State's Attorney testified that although the records concerning Sewell's prior mental illness were in his files at the time he made his application for the search warrant and presented the witness to Judge Prendergast, he was not personally aware of the information contained therein and that if he had been, he would have submitted the information to the trial judge prior to the issuance of the warrant. Thus we are not presented with the problem of a state official withholding information. In discussing this problem, the Court has not overlooked the fact that a search warrant's validity must be determined on the face of the affidavits submitted to procure it. Scott v. State, 4 Md. App. 482, 243 A.2d 609, Sessoms v. State, 3 Md.App. 293, 239 A.2d 118.

[10] Secondly, appellant alleges the tapes were not connected to him because the trial judge ruled that the identification of the voices by an Assistant State's Attorney to the stenographer who transcribed the tapes was inadmissible to prove the persons speaking thereon. This argu-

ment completely overlooks the fact the taped conversation agrees with the testimony of Sewell as to that part of the conversation he had with the appellant. It can be said that the tapes proved themselves to be connected with the appellant with reasonable probability. Veihmeyer v. State, 3 Md.App. 702, 240 A.2d 649. The contention also overlooks supporting testimony of the officers who placed the marked money on Sewell, observed him walk into the office with the appellant, listened to the broadcast portion of the conversation, and upon entering the office and searching the appellant found $100 of the marked money on his person.

[11] Thirdly, the appellant contends the stenographer's typed transcript of the tape is inadmissible because portions of the tape were unintelligible, particularly the beginning and the end of the conversation. This question goes to the weight of the evidence rather than to its admissibility. It would hardly be contended that a nontrespassing eavesdropper hearing a portion of the conversation could not testify to what conversation he overheard because he did not hear the entire conversation between the parties. The tapes supported a vital part of Sewell's testimony as to what occurred when he was in the office. The fact that it was not as complete as might be desirable does not make it inadmissible. If evidence is relevant, its weight is a matter for the trier of the facts. Bromwell v. State, 8 Md.App. 382, 259 A.2d 577.

Judgment affirmed. Appellant to pay costs.

APPENDIX B

IN THE COURT OF APPEALS OF MARYLAND

Miscellaneous Docket No. 14 (Criminal)

September Term, 1971

(No. 81, September Term, 1970 Court of Special Appeals)

JOHN TUMMINELLO

v.

STATE OF MARYLAND

Order

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied.

/s/ HALL HAMMOND
Chief Judge

[SEAL]

Date: April 5, 1971.

APPENDIX C

Part of Testimony of Robert A. Sewell Which Was Read to Jury at Second Trial

Q. All right. Would you tell us what the conversation was that you had with Johnny Tumminello?

* * *

A. I asked him—I mean he come down there, and he told me Father Maloney give him six hundred dollars to get me out and I said, "Yeah, on bond", I said, because I wanted to get my witness and things like that together. He said, "No, I can spring you for one thousand dollars". He was giving me the accounts of it so fast, actually I couldn't keep account of who was getting all this money.

* * *

Q. Did he mention any other names?

A. He mentioned—he told me the State's attorney and what they call the Clerk of the Court. And he said he wasn't making anything out of it himself. And I asked him, I said, "Well, you suppose to be the big man. I mean, I don't see why you wouldn't be the one to get the most money." And he said that he wanted everybody to keep their mouth, you know, shut.

* * *

By Mr. White:

Q. Did you make a statement to the State's attorney's office, Mr. Sewell, on May 9, 1967, under oath?

A. Did I make a statement? Yes sir.

Q. Now, in that statement, isn't it true that you said that Father Maloney told you and showed you a receipt that he had received one thousand dollars that he had given Johnny Tumminello, a thousand dollars that he had given him instead of six hundred dollars?

A. I meant the amount—I think it was a little more than one thousand dollars according to what he said.

Q. According—

A. According to the way it was shown to me. And I guess he was kind of confused. I want to tell you the truth. He had me kind of confused about paying so much money and kept asking for so much money, and so much money was handed out. All I can do is count the money I gave him out of my pocket when I got out. Furthermore, the money he was getting from these people, I don't know. All I know, when I come out, I saw a bunch of receipts and no money.

Q. Let me ask you the question again. Did you make a statement under oath at that time that Father Maloney showed you a receipt signed by Johnny Tumminello in the amount of one thousand dollars that Father Maloney had given John Tumminello?

A. No, I didn't.

Q. You did not make that statement under affidavit?

A. No, I didn't.

• • •

Q. Just a minute, Mr. Sewell. Did you make this statement, "I then went back into Father Maloney's house and Father Maloney told me that while I had been in the Maryland House of Correction he had paid Johnny Tumminello one thousand dollars"? Did you make that statement under oath?

A. That's correct.

Q. Did you make the statement that, "He", meaning Father Maloney, "showed me a card with Johnny Tumminello's name on it, which card showed a receipt of one thousand dollars on its back"? Did you make that statement under affidavit?

A. It wasn't all on the card. It was on the bank book and the card.

Q. Did you make that statement under oath?

A. That's correct. I saw the receipt off of the bank book and off the card there that he had wrote. He showed me the card with the receipt on it, what Johnny Tumminello gave me, what he give me.

• • •

Q. What did Father Maloney show you in connection with the bank book? And I am showing the witness the bank book at this time.

* * *

A. You can start lining up this here, right here. (Indicating) Here is what—This is what my receipt—what Father Maloney done drawed out. (Indicating) Now, it goes—

Q. Go ahead.

A. —six hundred and three hundred is how much you counted.

Q. Six and three is nine.

A. That is nine hundred dollars, right.

Q. Yes sir.

A. Okay. Now, here is one hundred and fifty more dollars. (Indicating)

Q. Well, that is—I think that is ten hundred and fifty dollars, right?

A. Okay. That at the time I made that affidavit there.

* * *

Q. That three hundred dollars, that was the three hundred dollars that you got later on, wasn't it? And you gave to Tumminello, you said?

A. I was giving—I give that to Tumminello, but he was sitting there adding this all together. This was all the receipts we was getting together.

Q. Father Maloney didn't tell you he had given that three hundred dollars to Tumminello, did he?

A. No, I don't actually know how Father Maloney was giving him that three hundred dollars. He drawed it out and give it. I don't know how he give it to him.

Q. You just said you give it to him.

A. I gave him three hundred dollars too, but, I mean, that three hundred dollars he gave me back ten dollars out for my kids to take care of me the rest of that month.

* * *

Q. The question is, did you pay Johnny Tumminello the three hundred dollars which is represented on this bank book as having been withdrawn on April 14, 1967?

A. I am the one that gives him that three hundred dollars, the top three hundred.

* * *

Q. Now, would you show me, please, on the bank book which you were referring to before when you made this statement under affidavit in the State's attorney's office that Father Maloney showed you a receipt where he had given Mr. Tumminello one thousand dollars?

A. Now, would you let me make this clear to you. By that bank book—I wasn't out here. I didn't withdraw anything out of that bank book. Now, not myself personally. I didn't draw anything out of there. I don't know when it was paid to him, how it was paid. All I can do is go by the book Father Maloney showed me and the receipts he showed me to account for the money. That's all.

Q. What I am asking you is what receipts did he show you?

A. Out of the book—He showed me what money he done paid out of the book there *for the attorney and things like that.* And that's all I know about it. I was in jail. So, I didn't know how that money was paid out. He got everybody else in there, a bunch of other people involved. [Emphasis added.]

* * *

Q. I am going to ask you again, please, and I quote again, "He showed me a card with Johnny Tumminello's name on it, which card showed a receipt of one thousand dollars on its back." Now would you please explain once more, if you can, if you are able to explain, what you meant by that?

A. What I meant—I explained to you. I said what is on the card and what is in the bank book. That is the receipt that I saw.

* * *

Q. What receipt on the bank book then makes up one thousand dollars?

A. See this? (Indicating) that leading three hundred dollars up there that I was telling to you, add it up. That is the one Father Maloney gave him. I mean, that is the one I give him. He give me back the ten dollars out of that when I got back out. [IP 39-451.]

* * *

Q. Well, what did you mean in the statement when you said, "Father Maloney told me that Johnny Tumminello had told him that the one thousand dollars was money which was to be used to pay my bond"?

* * *

A. What do you mean? As far as Father Maloney said one thousand dollars for money to pay his bond? No, he didn't say that. He said the money he give him—at first, Father Maloney told me the money he give him first was money to get my bond. That was the time I was in jail. I don't know what was going on between Father Maloney and Johnny Tumminello. Only after I got out, I give to the best of my knowledge the figures on the statement, the figures I got.

* * *

Q. Didn't you say in a sworn statement under oath to the State's attorney on May 9, 1967, that you had given Johnny Tumminello only two hundred dollars and not three hundred dollars?

A. I gave him—I give him the whole two hundred and ninety dollars. But, I was just counting—but, what he give me back—what I received back out of three hundred dollars. Two hundred and ninety dollars, that is what I paid Tumminello that day.

Q. Well, didn't you say in a sworn statement, "I then gave the two hundred dollars to Johnny Tumminello outside Father Maloney's house, and Johnny Tumminello told me that I still had to come up with an additional three hundred"?

A. I was trying to actually—actually, what I was doing then at that time there was telling the Priest a lie. And I told you that in the beginning in the statement, that I made that—I didn't like to be lying to the Priest. Now, I went to tell him the truth. I give him all of it, yeah.

* * *

Q. Didn't you tell the State's attorney, "I told Father Maloney that I needed three hundred dollars and Father Maloney said he thought two hundred dollars was enough to take care of my kids"?

A. That's where the statement might have gotten mixed up.

Q. Were you mixed up in the statement, or was that the truth?

A. That was the truth. The money I was giving him—I was paying him, but it was more money. I was saying less than what I give him. [IB455-459.]

* * *

Q. Didn't you tell the State's Attorney that Father Maloney gave you two one hundred dollar bills and told you to use this money to take care of the kids?

A. Father Maloney gave me three hundred dollars. He gave me three hundred dollars. [IB461.]

* * *

Q. First, how much money had been given to Mr. Tumminello of your own money by either you or anyone else at that time?

A. By me at that time it was as the total amount I got was about two thousand dollars already.

Q. Now, would you tell the ladies and gentlemen of the jury how you add up to two thousand dollars?

A. How do I add it up? The money that I have in my footlocker that I have a combination safe, that was the first. And the money that followed—

Q. Just a minute. The money you had where?

A. In my footlocker. * * *

Q. Where?

A. At my house.

* * *

Q. Let's get all this money added up now. How much from your footlocker?

A. According to what they told me—I count more—but they told me that it was about—the figures they give me was about two thousand and three hundred dollars altogether.

Q. That was in your footlocker?

A. And he give me a receipt for only twenty-two hundred dollars.

Q. Where is your receipt for twenty-two hundred dollars?

A. He had it on his desk. He wouldn't give it to me. He said the Judge needed five hundred dollars more. He was going to finish paying the five hundred dollars more. He was going to tear that receipt up that he had on his desk.

Q. The twenty-two hundred dollars came from where, now? * * *

A. Some come from the footlocker and some from the book what I withdrawed in the bank book here.

Q. I want to add up the two thousand dollars. What came from the footlocker?

A. I don't actually know. Don't ask me about that question. I don't know. I wasn't out here. I was in jail and I didn't pay out any of that money. I can't account for what they paid. I can say what I paid. Two or three dollars at a time, I don't know.

Q. Didn't you make an affidavit to the State's attorney that you had paid Tumminello twenty-two hundred dollars?

A. That's true. That's the amount he give me and the amount me and Father Maloney figured out.

Q. Well, I am trying to figure it up.

A. I am trying to figure it up too. All I can see is my money is gone. That's the only thing I can see. It is gone. He said he received only a certain amount and the people told me how much money they paid him. And

that's all I can answer to the best of my knowledge and it is no use me going into where it came from, what money was taken out of that place because I don't know. *I don't know how much was taken out of the bank or where it went to.* Father Maloney said it was paid to him. [IB468-471; emphasis added.]

* * *

Q. Did you tell the State's attorney that some Government checks had been given to Mr. Tumminello?

A. I told him—I mean, I have told him Government checks. I told him how they were—how they paid him off. *I don't know how they paid him off.* That is what I answered. I don't know how they paid him off. That is what I had in the locker there. I had some checks in the locker. [IB474; emphasis added.]

* * *

Q. Were there two of those checks?

A. Now, I learned later that he didn't pay him all in checks.

Q. Didn't you, Mr. Sewell—Mr. Sewell, didn't you make affidavit to the State's attorney on May 9th that your son, Howard Leroy Sewell, came to see you at the House of Correction around March 17th of 1967, and told you that he had given Johnny Tumminello two checks, which were United States Treasury checks, each payable to you in the amount of four hundred and eleven dollars?

A. Yeah, but he said it was a misunderstanding. That is the only thing he told me later on. That's what he told me first. But, when this stuff commenced to rolling and started to getting dangerous, he claimed—and so he got kind of frightened, and he told me, he said—he gave me the money, and he said he didn't want no more part of it.

Q. He told you he had given Mr. Tumminello two checks?

A. He deemed it afterwards. I asked him did he give him the checks, and *he said no he didn't give him the checks.* He said he give him that money.

Q. How much cash money?

A. He said altogether—I asked him, and he said around about one thousand and one hundred dollars, something like that, one thousand and one hundred dollars. [IB476-477; emphasis added.]

* * *

Q. Now, Mr. Sewell, how much money did you, yourself, personally give to me Tumminello?

A. I mean, what I give him, it come to pretty close to four hundred dollars almost.

Q. Four hundred dollars almost? A. About ten dollars—maybe about ten dollar short. [IB485.]

* * *

Q. Mr. Sewell, in your affidavit to the State's attorney, Defense Exhibit No. 1, you stated, "Since Johnny Tumminello told me to keep in contact with him, I called him at least twice after April 14th and discussed with him over the phone how I was to pay the rest of the money." Is that correct? Is that correct that you called him twice after April 14th?

A. I mean, I called him—he told me—when I told him I couldn't get the money, I called him and notified him. I mean, those are the two definite calls I made at that time, the two serious threatening calls I made at that time.

Q. The two threatening calls that you made?

A. Yeah, somebody else on the extension listening.

* * *

Q. Did you mention that at any time to the State's attorney about paying the one hundred dollars to Mr. Tumminello?

A. I do not know whether I mentioned all the money in there or not because the way the figures—I mean, actually over—I mean, underestimated it because all the money—I mean, believe me. I tell you this. It's a pitiful shame. *I had money, but it's all gone and who received it, I don't know. I don't know.* I got the figures from him. The exact figures he gave me *and the figures I got from the police.* [IB491-493; emphasis added.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 17 71-17

JOHN B. TUMMINELLO,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 17

JOHN B. TUMMINELLO,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENTS

This Brief in Opposition to the Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court.

OPINION BELOW

The opinion and judgment of the Court of Special Appeals are reported at 10 Md. App. 612, 272 A. 2d 77 (1971), and are printed as Appendix A of the Petitioner's brief.

QUESTIONS PRESENTED

1. Was Petitioner's right to confrontation under the Sixth Amendment violated when the testimony of the prosecuting witness, which was taken at the prior trial, was read into evidence at the time of Petitioner's second trial because the prosecuting witness was mentally ill and declared to be unavailable?

2. Was Petitioner's right to due process under the Fourteenth Amendment violated when the transcript of a tape recording, a portion of which was inaudible, and in which the voice uttering the incriminating statements was never directly identified as that of the Petitioner, was admitted into evidence?

CONSTITUTIONAL AMENDMENTS INVOLVED

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States provides, in part:

> "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT OF THE CASE

After Petitioner's original conviction for false pretenses in a jury trial held in the Criminal Court of Baltimore on August 4, 1968 was reversed by the Court of Special Ap-

peals of Maryland on August 5, 1969,[1] Petitioner was retried and found guilty on December 9, 1969 of the same offense at a second jury trial in the Criminal Court of Baltimore and sentenced to the jurisdiction of the Department of Correctional Services for a period of three (3) years.

In 1966, one Sewell had been convicted of a crime and was sentenced to a term of imprisonment (T. 194).[2] It was at this time that Father Maloney met Sewell. Father Maloney opened a bank account for Sewell in their joint names, in an effort to handle Sewell's financial affairs during the time in which Sewell was serving the term of his imprisonment (T. 193-194). At Sewell's direction, Father Maloney withdrew $300 on February 24, 1967, for an attorney's fee and $500 on April 5, 1967, for a bondsman (T. 197-198) whom Father identified in court as being Petitioner (T. 199). Petitioner called Father Maloney five days later and advised Father that he was coming to get the money in order to get Sewell out of jail. When Petitioner arrived, the Father testified that Petitioner asked for $600.00 and said that the additional $100 was for people who had to be paid off in order to "fix" the case (T. 200-202). Father asked for a receipt, and Petitioner wrote "$600 paid, held in escrow for Robert Sewell" on the back of his business card and gave it to Father (T. 204-206). Father Maloney further

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[1] *Tumminello v. State*, 7 Md. App. 380, 256 A. 2d 342 (1969). This reversal was not predicated upon any of the grounds relied upon by Petitioner in the present Petition for a Writ of Certiorari.

[2] Unless otherwise indicated, all references to the transcript relate to the second trial of Petitioner which began on December 8, 1969, and is the subject of this Petition for Writ of Certiorari. Where it is necessary to refer to the transcript of record of Petitioner's first trial, the Respondent will use the same system and nomenclature as suggested by Petitioner in his Footnote No. 1. Therefore, when referring to the first trial, the preface "I" will refer to the transcript of the first trial; the letters "A", "B", etc., will refer to the volume of the transcript of the first trial which is involved, and the final number used will refer to the page of the cited volume.

testified that Petitioner stated that the money would be repaid "if it couldn't be arranged" (T. 206). There was no discussion concerning a bail bond. Four days later Sewell was out of prison and was brought home by Petitioner (T. 207). Sewell asked Father to drive him to the bank to obtain $300 more (T. 208). Sewell's bank book showed a withdrawal of $300 on April 14, 1967, and Sewell had the $300 with him when he got into Petitioner's car (T. 209). On cross-examination, Father Maloney reiterated that the money was to be used to have the case "fixed" (T. 219).

Petitioner advised Sewell that the former could "spring" Sewell for $1,000 (T. 294). Of this money, Judge Cullen[3] would receive $500, the State's Attorney or Clerk of Court would receive $500, but Petitioner "wasn't making anything out of it himself" (T. 295). The Petitioner started to demand additional monies, and threatened that if the additional monies were not obtained, Judge Cullen would send Sewell back to prison for four years (T. 306-307). Because of these threats, and Sewell's fear that Petitioner would have Sewell sent back to prison (T. 309), Sewell was finally taken to the State's Attorney's Office by an attorney (T. 310).

On May 24, 1967 there was a meeting in the State's Attorney's office of several police officers, two Assistant State's Attorneys and Robert Sewell (T. 479). Sgt. Armstrong made the affidavit to Judge Prendergast that there was probable cause for the issuance of the search and seizure warrant (T. 484). He acknowledged that his affidavit of probable cause was based upon the assumption that the statements made by Sewell were correct (T. 486). The then State's Attorney, Charles E. Moylan, Jr., had signed

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[3] Judge James K. Cullen of the Criminal Court of Baltimore had sentenced Sewell to the Maryland House of Correction for a period of four years.

the complaint which lead to the issuance of the arrest warrant (T. 487). Mr. Moylan testified that he questioned Sewell and was impressed that Sewell was a reasonably responsible witness (T. 511-513). Had Mr. Moylan known of Sewell's mental condition, he would have presented that information to Judge Prendergast (T. 415). Sgt. Armstrong was also unaware of Sewell's mental disorder (T. 490).

A court order was also obtained to allow Sewell to be outfitted with an electronic recording device (T. 510). Both Sgt. Armstrong and Sgt. Steven Tabling saw Sewell outfitted with the electronic device, and they both observed that Sewell was given $150 in pre-recorded money (T. 480-481, 466). All of the officers took up positions where they could observe Petitioner's office (T. 467). Sgt. Armstrong observed Sewell meet Petitioner and after a brief conversation, the two entered Petitioner's office (T. 481).

Marshall Meyer had furnished the State's Attorney's Office with the electronic device used by Sewell (T. 398). As the conversation was transmitted, Meyers tape recorded the same from his automobile (T. 400). Sgt. Tabling was also in Meyers' automobile and heard the voices which were transmitted from the electronic device to the tape recorder (T. 467-468).[4] Meyers than gave the tape to the Assistant State's Attorney (T. 405).

A court stenographer, Yale Aarons, did not know Sewell or Petitioner (T. 425). He stated that the voices on the

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[4] At a pre-arranged signal, Sgt. Armstrong, Sgt. Tabling, Officer Nevin and an Assistant State's Attorney entered the building with their search and seizure warrant and the arrest warrant (T. 482). The warrants were shown to Petitioner (T. 482). Petitioner emptied his pockets, and both Sgt. Tabling and Sgt. Armstrong testified that Petitioner stated, in essence, "There is the money he gave me, that's what you are looking for" (T. 469, 483). The money which came out of Petitioner's pocket corresponded to the same serial numbers which had been pre-recorded (T. 469-483).

tape were identified by one of the Assistant State's Attorneys (T. 426), and that he was certain that all of the testimony transcribed from the tape recorder which referred to "S" was the same person, and all the testimony referred to as "T" was the same person (T. 423). Mr. Aarons was only successful in transcribing the middle portion of the tape, and he testified that the first and last parts of the tape were completely unintelligible (T. 424-425).

Rather than reiterate Sewell's mental condition as set forth in the record, the Respondent adopts the Petitioner's Statement of the Case at pages 11 through 13 of the Petition for a Writ of Certiorari, with the exception of the footnotes contained therein. Petitioner's second trial was approximately twenty months after the first trial. Sewell's mental condition had deteriorated to such an extent during this period of time that the trial court held that Sewell was so incompetent to testify at the time of the second trial as to be declared an unavailable witness. Accordingly, the trial court determined that Sewell's testimony given at the prior trial would be admissible at the second trial of Petitioner (T. 155). Based upon this determination, Sewell's testimony from the first trial was subsequently read to the jury at the time of Petitioner's second trial (T. 288-390).

With reference to the tape recording of the conversation between Sewell and Petitioner, the *Defense* objected to the identification of the voices on the tape. As the result of this objection, the trial court ordered the voices designated as "1" and "2" instead of "S" and "T" as they appeared in the transcript which Aarons had prepared (T. 432-442). The transcript of the tape was then read to the jury (T. 451-462).

ARGUMENT

I.

THE PETITIONER'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT WAS NOT VIOLATED WHEN THE TESTIMONY OF THE PROSECUTING WITNESS, WHICH WAS TAKEN AT THE PRIOR TRIAL, WAS READ INTO EVIDENCE AT THE TIME OF PETITIONER'S SECOND TRIAL BECAUSE THE PROSECUTING WITNESS WAS MENTALLY ILL AND DECLARED TO BE UNAVAILABLE.

If nothing more, Petitioner's entire argument substantiates the fact that it would have been totally impossible to allow Sewell to have testified at the time of Petitioner's second trial. Petitioner's quote of the prosecution's psychiatric witness (Pet. 17) was received at the time of Petitioner's *second* trial, and helps to narrow the entire issue. Therefore, the Respondent would submit that the only question upon which the Petitioner relies is whether or not Sewell should have been allowed to testify at the time of Petitioner's first trial. It is the Petitioner's general contention that Sewell, the chief prosecuting witness, "was an insane criminal who had not one psychotic disability but four: paranoia, schizophrenia, brain damage and epilepsy *grand mal*" (Pet. 17). Petitioner's contention that Sewell's testimony, standing by itself, was "riddled with conflicts, contradictions and utter confusion" (Pet. 17) is nothing more than a mere bald allegation without any substantiation whatsoever. Assuming that there may have been some discrepancies in Sewell's testimony, Sewell's testimony taken in its totality would be a question for the jury, as the trier of fact, to determine. The jury would determine whether or not to believe Sewell, and this would be true whether reference is made to the jury in Petitioner's first case wherein Sewell was personally present and testified, or the jury in the second case wherein Sewell's testimony from the first trial was read to them.

The Respondent acknowledges that the record is replete with references that Sewell had been suffering from various stages of mental illness for a long period of time. However, it is interesting to note that Sewell was convicted of a crime and sentenced by Judge Albert L. Sklar in 1966; and again convicted and sentenced by Judge James K. Cullen later the same year. The tape recording of the conversation between Sewell and Petitioner took place on May 24, 1967 (T. 479), and Petitioner was first tried on March 27, 1968. The transcript of the tape recording, which was read to the jury at the time of the second trial (T. 451-462), corresponds to a great extent with the testimony which Sewell had given personally at Petitioner's first trial and which was read to the jury at Petitioner's second trial (T. 312-316). It is the Respondent's position that all of the above substantiate the fact that Sewell was not so incompetent at the time of Petitioner's first trial to warrant the complete disregard of the testimony he personally gave then. Conversely, the Respondent would submit that because of Sewell's condition at the time of the Petitioner's second trial, no error was committed in allowing Sewell's original testimony to have been read to the jury at the second trial. To have had Sewell present at the time of the second trial, as apparently suggested by the Petitioner (Pet. 19), would have served absolutely no purpose whatsoever with regard to Sewell's testimony at the time of Petitioner's first trial. The presence of Sewell would have merely added substance to the trial court's finding, based upon psychiatric evidence introduced preliminarily, that Sewell was "unavailable" to testify personally at Petitioner's second trial.

The Petitioner recognizes "the general rule that the prior testimony of a witness may be read to the jury if the witness is no longer 'available' and if full cross-examination was allowed when the testimony was originally given"

(Pet. 19). Although the Petitioner argues otherwise, a review of the cross-examination of Sewell by Petitioner's trial counsel at the time of the first trial, does not demonstrate that the cross-examination of Sewell was incomplete.

While it may be true that the psychiatrist who concluded that Sewell was not competent to participate in Petitioner's second trial, stated that Sewell had been suffering from a mental disease for many years, this point does not appear to control the specific question of Sewell's sanity at the time of Petitioner's first trial. The same psychiatrist further stated that he was unable to determine with certainty the intensity of the disease in March of 1968 (the date of the original trial of Petitioner), because he had not examined Sewell at that time. It was further pointed out that Sewell's mental condition would "go up and down" (T. 65-66). In response to questions by the trial court, the psychiatrist stated that he could not be precise in determining whether or not a specific patient would give an accurate account of events without examining the patient (T. 66-67), although he did admit that it could be likely that Sewell was subject to the same deficiencies in March, 1968 as at the time of the Petitioner's second trial. Conversely, the psychiatrist testified that it was also possible that Sewell was in a state of remission at the time of Petitioner's previous trial, thereby making Sewell's testimony reasonably accurate (T. 71).

The cases cited by Petitioner do not appear to be of appreciable value in his attempt to have this Court grant a Petition for a Writ of Certiorari. *People v. McCaughan*, 49 Cal. 2d 409, 317 P. 2d 974 (1957), cited as Footnote 28 in Petitioner's Brief at page 18, involved the manslaughter conviction of a psychiatric technician in a state mental hospital. The question before the Court was whether or not two mentally defective patients should be allowed to

testify. Ironically, the trial court held that the mental patients were *qualified* to testify against Dr. McCaughan, and the appellate court upheld this decision. This was so in spite of a California Statute which related, in essence, that those who are of unsound mind at the time of their examination in court may not testify. Nevertheless, the Court determined that the question of sanity was to be determined at the time the witness was produced for examination. The Court at page 981 held the following:

> "Whether he did proceed accurately, does recollect, and is communicating accurately and truthfully, are questions of credibility to be resolved by the trier of fact."
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> * * * * * *
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> "It is universally recognized that the competency of a witness is to be determined by the trial court in the exercise of its judicial discretion."

The second statement above quoted immediately preceded the quote used by the Petitioner. It would be the Respondent's position that the principles set forth in *McCaughan* were followed in Petitioner's case. In the event that Sewell's sanity was not questioned at the time of Petitioner's first trial, the Respondent would take the position that Petitioner may have waived the question of Sewell's sanity at the time of the first trial.[5] In any event, it is further submitted by the Respondent that the trial court did not err in determining that Sewell was apparently competent to testify as a witness *at the time of his examination, i.e.,* Petitioner's first trial.

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[5] The question of Sewell's sanity was not raised directly on appeal of Petitioner's first trial. Petitioner did raise the point concerning whether or not the trial court limited Petitioner's trial counsel's cross-examination of Sewell when an objection was sustained to the inquiry of whether Sewell had requested a psychiatric examination when Sewell was convicted of assault.

While it may be true, as suggested by Petitioner (Pet. 20), that *Barber v. Page*, 390 U.S. 719 (1968) stressed the importance of having a witness made available for trial rather than relying upon his testimony from a prior hearing being read to the jury, the factual situation in *Barber* is simply inapplicable. In *Barber*, the "unavailable" witness was in a federal prison, and could have been produced at a subsequent trial in order to personally testify. In the instant case, Sewell was unequivocally "unavailable" because of his mental incapacity and inability to testify.

In the same context, *Washington v. Texas*, 388 U.S. 14 (1967) is of no avail to Petitioner. Factually, Washington's conviction was reversed because "the State arbitrarily denied him the right to put on the stand a witness who was *physically and mentally capable of testifying* to events which he personally observed * * *" see Page 22. (Emphasis supplied.) There is no question but that Sewell was not physically and mentally capable of testifying at the time of Petitioner's second trial.

Finally, the reasons given by the Court of Special Appeals of Maryland for rejecting Petitioner's contention that Sewell was incompetent at the time of Petitioner's first trial are sufficient in considering Petitioner's Writ of Certiorari. The appellate court agreed with the trial court that the testimony elicited at Petitioner's second trial was not sufficient to overcome the presumption that Sewell was sane at the time he testified at Petitioner's first trial (Pet. 8a).

II.

THE PETITIONER'S RIGHT TO DUE PROCESS, UNDER THE FOURTEENTH AMENDMENT, WAS NOT VIOLATED WHEN THE TRANSCRIPT OF A TAPE RECORDING, A PORTION OF WHICH WAS INAUDIBLE, AND IN WHICH THE VOICE UTTERING THE INCRIMINATING STATEMENTS WAS NEVER DIRECTLY IDENTIFIED AS THAT OF THE PETITIONER, WAS ADMITTED INTO EVIDENCE.

The Respondent does not dispute the fact that it was necessary for Mr. Aarons to repeatedly replay portions of the tape in question in order to make the stenographic transcript of the conversations on the recording (T. 417-418). However, the Respondent would submit that this contention of the Petitioner, as well as all of the other contentions of the Petitioner concerning the tape, would go to the weight to be assigned to the transcript of the tape, rather than the admissibility of the same. *Lynch v. State*, 2 Md. App. 546, 236 A. 2d 45 (1967). See also *McGuire v. State*, 200 Md. 601, 92 A. 2d 582 (1952) wherein the stenographic transcript was admitted in evidence as secondary evidence because the tape could not be replayed on the tape recorder.

Petitioner has cited several cases which appear to hold that the notes transcribed by a stenotype operator are not admissible in evidence where the recording is either unintelligible or must be repeatedly replayed in an effort to have the conversation transcribed (Pet. 22-24). However, each of these cases also indicate that an individual may testify to the conversations which have been recorded. In the instant case, a portion of Sewell's testimony which was read to the jury (T. 312-316) was virtually the same as the conversations contained in the transcript (T. 451-462). Included were the conversations concerning the obtaining of the money under false pretenses, Petitioner's instructions to Sewell not to give his attorney any additional fee, and

Petitioner's assistance to Sewell in trying to help Sewell obtain a job. The Respondent would further submit that Sewell's testimony was sufficient to properly identify the voices as those of Sewell and Petitioner.

In *Fountain v. United States,* 384 F. 2d 624 (5th Cir., 1967), a telephone conversation was recorded. An objection was raised to the reception in evidence of the copies of the recording rather than the use of the original tapes because a noise suppression process was used. A major factor in *Fountain* was the strong showing of the accuracy and reliability of the copy, and its value in making the conversations more easily discernible to the jury. In this same context, there does not appear to have ever been an objection by the Petitioner that the transcript was either inaccurate or unreliable, with the possible exception that it was necessary to replay the tape several times in order for Mr. Aarons to make the transcript. Therefore, the Respondent would again submit that all of the Petitioner's contentions go merely to the weight given the transcript, rather than to its admissibility.

In *Johns v. United States,* 323 F. 2d 421 (5th Cir., 1963), it was held that secondary evidence may be admitted where the original was unintelligible. See also 4 Wigmore, *Evidence* §§1229-1230 (3rd Ed., 1940). In *Johns,* the recording was available, but because the volume could not be turned up loud enough for the jury to hear the recording, a copy of the recording, which was conceded to be accurate, was allowed to be introduced into evidence.

As pointed out by the trial court at Petitioner's second trial (T. 440), it was Petitioner's trial counsel who brought out the identification of the voices on the tape as those of Mr. Sewell and Petitioner. This was during the cross-examination of Mr. Aarons (T 426-428). As the transcript was read to the jury, the parties were identified as number

"1" and "2". Although it may be true that Sewell, at the time of Petitioner's first trial did not specifically identify the voices on the tape as those of Petitioner and his own (Sewell's), it was brought to the attention of the trial court that the transcript of the tape was similar to the testimony of Sewell (T. 437-438). This, therefore, would be sufficient to identify the voices for the benefit of the jury. Accordingly, the Respondent would submit that there was no prejudicial error in allowing the jury to hear the transcript of the taped conversation, rather than the tape itself.

CONCLUSION

Since it was determined that Sewell was actually unavailable at the time of Petitioner's second trial, the reading of Sewell's testimony, which was elicited at the time of Petitioner's first trial, in lieu of his presence at the trial, was warranted. Any objection by Petitioner to the transcript of the taped conversation between Petitioner and Sewell relates to the weight to be given to the transcript, rather than to the admissibility of the conversation itself. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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